

² See Eaker v. North Carolina Combine Records, et al., 5:02ct782 (E.D. N.C.) (Dismissed as Court concluded that Plaintiff had no claim under 42 U.S.C. § 1983).

1:07cv575, which was dismissed with prejudice as to his medical deliberate indifference claim and without prejudice, for failure to exhaust, as to his failure to protect claim, should count as a strike. (Doc. No. 8).

Plaintiff now argues that his case from the Middle District of North Carolina, 1:07cv575, should not count as a strike because his complaint was dismissed without prejudice for failure to exhaust administrative remedies, not for failure to state a claim. (Doc. No. 10 at 2). Plaintiff is only partially correct. The Court has again reviewed the magistrate judge's report and recommendation, the District Court's Order adopting the magistrate judge's report and recommendation, as well as the Judgment filed in Petitioner's case from the Middle District of North Carolina. See Eaker v. Miller, et al., 1:07cv575 (M.D.N.C.) (Doc. Nos. 86, 89 and 90). As explained in this Court's prior Order, the court in that Middle District case, in adopting the magistrate judge's report and recommendation, dismissed Plaintiff's § 1983 lawsuit with prejudice for failure to state a claim for deliberate indifference and also without prejudice for failure to exhaust his claim regarding failure to protect. (Id. Doc. No. 89). Such dismissal counts as a strike for purposes of 28 U.S.C. § 1915(g), as explained in the Court's previous Order.

IT IS, THEREFORE, ORDERED that Plaintiff's motion for reconsideration (Doc. No. 10) is denied.

Signed: February 11, 2011

A handwritten signature in black ink, reading "Robert J. Conrad, Jr.", written over a horizontal line.

Robert J. Conrad, Jr.
Chief United States District Judge

